sell at stated prices, which in the *Colgate* case was held to be within the legal rights of the producer."[18] But whatever the present status of the *Colgate* case, one thing seems clear—the passage to the legal methods of that case, which the court has assumed to preserve between the Scylla and Charybdis of the subsequent decisions, is narrow and dangerous, and the manufacturer who would take advantage of the passage will need a truly skilful pilot.

NULLIFICATION OF THE REFERENDUM BY LEGISLATIVE DECLARATION OF EMERGENCY

Shall the Supreme Court say that the Legislature has deliberately told a falsehood? This problem is troubling several states in connection with their initiative and referendum constitutional amendments, which provide that emergency measures necessary for the immediate preservation of the public peace, health, and safety shall not be subject to the referendum.[1] The issue is whether the court may go behind a legislative declaration of emergency, attached to an act, so as to decide whether the act is really referable to the people or not.

A distinction of some value may be drawn between a declaration of emergency that merely abridges the time in which a statute shall go into effect and one the purpose of which is also to prevent a popular referendum.[2] Many state constitutions provide that all laws shall take effect

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company; or (5) by utilizing any other equivalent co-operative means of accomplishing the maintenance of prices fixed by the company." 42 Sup. Ct. at p. 155.

It is difficult to see anything in the methods enumerated more unlawful than in the "simple" methods of the Colgate Company. As put by Mr. Justice McReynolds, dissenting: "Having the undoubted right to sell to whom it will, why should respondent be enjoined from writing down the names of dealers regarded as undesirable customers? Nor does there appear to be any wrong in maintaining special salesmen who turn over orders to selected wholesalers and who honestly investigate and report to their principal the treatment accorded its products by dealers. Finally, as respondent may freely select customers, how can injury result from marks on packages which enable it to trace their movements? The privilege to sell or not to sell at will surely involves the right by open and honest means to ascertain what selected customers do with goods voluntarily sold to them." 42 Sup. Ct. at p. 156.

[18] 42 Sup. Ct. at p. 154. (Italics ours.)

[1] The following is a typical constitutional provision: "The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law or any part thereof, passed by the Legislature, except such laws as may be necessary for the immediate preservation of the public peace, health, or safety, support of the state government and its existing public institutions." Wash. Const. sec. 1, art. 2, subd. b, amendment 7.

[2] The first merely increases the enacting power of the state legislature; the second operates in addition to infringe upon the reserved power of the people to nullify the act by a referendum. *State v. Stewart* (1920) 57 Mont. 144, 187 Pac. 641. See (1920) 5 MINN. L. REV. 82. As to the effect of one clause upon the other, see *In re Interrogatories by the Governor* (1919) 66 Colo. 319, 181 Pac. 197.

ninety days after the adjournment of the legislative session, except those containing a declaration of emergency and passed by a two-thirds vote of each house of the legislature. The fact that the state constitution usually specifically provides that the legislative declaration of an emergency shall be conclusive in these cases is some evidence that, without this constitutional provision, such a declaration is not conclusive.

Relying on the long-established rule that the existence of a public necessity is a matter of legislative policy,[3] cases have held that whether an act is an emergency measure, as declared by the legislature, is not a question for judicial review.[4] In *State, ex rel. Durbin, v. Smith* (1921, Ohio) 133 N. E. 457, the Supreme Court of Ohio has held, by a bare majority not wholly agreeing with each other, that the same rule applies in determining whether or not an act of the legislature is subject to the referendum.[5] A statute reorganizing certain state departments[6] had been passed and had been declared by the legislature to be an "emergency law", thus accelerating the date of its operation and preventing a referendum.[7] The court denied an applica-

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[3] 1 Willoughby, *Constitution* (1910) 19; *Scott v. Frazier* (1919, D. N. D.) 258 Fed. 669.

[4] *Kadderly v. Portland* (1903) 44 Or. 118, 74 Pac. 710. "The existence of such necessity is a question of fact, which the General Assembly in the exercise of its legislative functions must determine; and under the constitutional provision above quoted, the fact cannot be reviewed, called into question, nor be determined by the courts. It is a question of which the Legislature alone is the judge, and when it determines that fact to exist, its action is final." Per Gabbert, C. J.. *Van Kleeck v. Ramer* (1916) 62 Colo. 4, 10, 156 Pac. 1108, 1110. *State v. Bacon* (1901) 14 S. D. 394, 85 N. W. 605, cited by most of the cases as an authority for the conclusiveness of the legislative declaration, has been overruled. *Hodges v. Snyder* (1920) 43 S. D. 166, 178 N. W. 575.

[5] The majority opinion is *per curiam*. One of the dissenting opinions is respectful of the majority, though perhaps not of the legislature: "Cheerfully conceding that the majority have conscientiously arrived at a different conclusion, I have felt it my duty to place this dissent upon the record in the hope that it might to some extent operate to check further tendency by the General Assembly to disregard the plain provisions of our Constitution, however vain and fanciful that hope may be." (at p. 473) Of the other dissenting opinions, one can scarcely say as much: "The dominant portion of the court has robbed the sacred Constitution;" "it has ruthlessly trampled under foot;" "the outrage which has been perpetrated upon the people;" "my brethren of the majority have simply erected a smoke screen;" "I submit the foregoing to the candid and conscientious judgment of the people of Ohio;" "I fear this is another Dred Scott Decision."

[6] Described by the dissenting Chief Justice as "a ripper bill."

[7] The Ohio Constitution provides that "emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. Such emergency laws upon a yea and nay vote must receive the vote of two-thirds of all the members elected to each branch of the General Assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a yea and nay vote, upon a separate roll

tion for a writ of mandamus to compel the Secretary of State to set the referendum machinery in motion.

In the instant case there was no question that the subject matter of the act was within the powers of the General Assembly. The act had been duly passed by the required two-thirds vote; and the reasons for declaring it to be an emergency law had been properly set out at length in a separate section adopted by a separate vote. The question was as to the legal operation of the legislative declaration that an emergency existed making the act "necessary for the immediate preservation of the public peace, health, or safety."

The answer to this required the consideration of three subsidiary questions. First, was the court being asked to pass upon the constitutional powers of the General Assembly? Secondly, do the courts have power to review the legislative declaration of the fact of an emergency? Thirdly, can the court say that the declaration of an emergency in the instant case was false beyond any reasonable doubt?

The first of these must clearly be answered in the affirmative.[8]

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call thereon. The laws mentioned in this section shall not be subject to the referendum." Sec. 1, art. 2.

[8] Two of the dissenting judges deny this; but they demonstrate their own error. Thus Marshall, C. J., at p. 462, says: "no question of constitutional power is involved . . . . For the purpose of this controversy it may be admitted that the act is constitutional. The majority opinion has laboriously raised a man of straw and then pretended to knock him over." ". . . . it is not claimed that any part of this law transcends the legislative power conferred by the constitution." But elsewhere he says: "the emergency clause . . . . is no part of its operative provisions. It is merely intended as a statement of reasons to justify [empower] the Legislature *in making the provisions of the law immediately operative,* thereby forestalling a referendum." And again, "If the executive branch of the government should attempt to execute the provisions of the law immediately after its passage, without such law having a separate section declaring the reasons . . . [*or with such a section declaring false reasons,* if the views of the Chief Justice are followed] such attempted execution could be enjoined, and a constitutional question would be presented, because it would involve a question of legislative power, and not a question of legislative policy."

Wanamaker, J., says: "We of the minority do not claim that there is any conflict between the provisions of the act known as the Administrative Code and the Constitution. . . . The only question here is as to when this act, presumed to be legal, presumed to be constitutional, is to go into effect." (at p. 475) It will be observed that the learned judge, contrary to his own assertion, does claim that the legislature provides that the act shall be operative at once and that the constitution declares that it shall not. This looks like "conflict."

Johnson, J., takes the correct view that not only are the legislative powers of the General Assembly involved, but so also are the legislative powers of the people. He says: "I agree with the majority that, where there is doubt as to the constitutionality of a statute, the doubt should be resolved in favor of its validity, and the legislative power conferred upon the General Assembly should in such case be upheld. So in this case the legislative *power* conferred upon the people by the Constitution should be upheld; and, where there is doubt as to the sufficiency of reasons or declarations for taking away this constitutional

The constitutional validity of the statute, although not its wisdom or policy, was being determined. Can the General Assembly make such an act operative after the expiration of ninety days? This is a question of constitutional power; but it was not involved in the case, and such power was not doubted. Can the Assembly make such an act operative before the expiration of ninety days? This is equally a question of constitutional power; it was involved in the case and it was bitterly contested. The majority therefore thought the court disabled by another provision of the constitution declaring that statutes should not be held unconstitutional against the dissent of more than one member of the court.[9]

The second question would be answered in the affirmative by five of the seven members of the court.[10] No attempt will be made here to reconcile the conflicting decisions. Each case must turn upon the interpretation of specific constitutional language. It will merely be pointed out that life, liberty, and the pursuit of happiness will not be greatly jeopardized by a decision either way. Even though we regard the determination of the facts constituting an emergency as a judicial matter, the Ohio Constitution might reasonably be construed as committing it to the discretion of the General Assembly, such determination requiring a "two-thirds vote of all the members elected to each branch," a special roll call on the section declaring an emergency, and a statement of the reasons requiring such action. These unusual safeguards would hardly be necessary if the Supreme Court has the final determining power. Also, the people of Ohio evinced a pretty strong desire to curb the power of the Supreme Court to declare statutes unconstitutional.[11] Perhaps they were content with their biennial referendum on the merits of their representatives as a sufficient check on the abuse of legislative power to declare an

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right of the people, that doubt should be resolved in favor of the constitutional *privilege* which belongs to the people." (at p. 473)

[9] "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges." Sec. 2, art. 4. In the instant case two of the judges (and apparently only two) were fully convinced of the constitutional power of the General Assembly to make the law operative at once. Thus did the constitution-makers of Ohio fall between two stools. In their distrust of their own voluntarily-chosen legislators, they limited their powers by the referendum provisions. In their distrust of their own chosen judges, they so curbed the judicial power as to disable the Supreme Court (Johnson, J., *contra*) from enforcing the referendum limitations on the legislators.

[10] The court had unanimously so held in a previous case. *County of Miami v. Dayton* (1915) 92 Ohio St. 215, 110 N. E. 726. See in *accord: State v. Meath* (1915) 84 Wash. 302, 147 Pac. 11; *State v. Hinkle* (1921, Wash.) 198 Pac. 535; *State v. Becker* (1921, Mo.) 233 S. W. 641; *Fogelsville, etc. v. Pa. Light Co.* (1921, Pa.) 114 Atl. 822. For cases *contra,* see *supra* note 2. See also (1921) 31 YALE LAW JOURNAL, 204.

[11] See *supra* note 9.

emergency.[12] However great may be the merits of our theory of the separation of powers, our constitutions do not and can not carry it out in every detail.

The third question was answered by the majority in the negative. It must be admitted that the effort in this respect was labored. The dissenting judges were more successful on this than on the other points. They make the "reasons" stated by the legislature appear extremely weak, if not even ridiculous.

Dissenting opinions render a valuable service to the law and to the community. We are now well accustomed to judicial disagreement and to five to four (or four to three) decisions on constitutional matters of high importance. Nevertheless, a mild regret may be expressed when judicial opinions are in violent disharmony, "like sweet bells jangled, out of tune and harsh."

DAYLIGHT SAVING LAWS

The repeal of the Federal Daylight Saving Law[1] has occasioned such conflicting local regulations that the resulting exasperation may present an interesting legal question. "Daylight saving" has an unfortunately varying effect upon the welfare of different classes and occupations.[2] A blessing to the confined office worker, it is anathema to his brother on the farm. It is thus very largely a local question, even though our industrial organization is so complex that a change in the setting of John Clerk's alarm clock sometimes causes a change in the hour of Tom Farmer's rising. The preponderance of urban or rural voters may settle the state policy in the matter; and no court would deny the validity of a state law without such extreme oppressiveness in application as to invite general non-compliance with its terms.[3] If convenient to the general public, its constitutionality may be assumed.[4]

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[12] It has been argued that to permit the legislature to determine the existence of its own power to prevent a referendum is to nullify the provision for a referendum altogether. This is too strong a statement. A court is often required to determine the existence of its own jurisdictional power by a determination of the operative facts upon which that power depends.

[1] Act of Aug. 20, 1919 (41 Stat. at L. 280).

[2] See *Daylight Saving—A Brief for Debate* (1917) 90 THE INDEPENDENT, 249, collecting references to various views; see also Boston Chamber of Commerce, *Report of Special Committee on Daylight Saving* (1917).

[3] The statutes so far passed may be put into three classes: First, those which established daylight saving time throughout the state. Such a statute has been passed in Massachusetts. Mass. Acts, 1921, ch. 145. Second, those providing for local option, the state of New York alone having passed such a law. N. Y. Laws, 1921, ch. 70. Third, those forbidding the observance of any other than the regular standard of time. Connecticut, Vermont, and New Hampshire have passed such laws. Conn. Pub. Acts, 1921, ch. 37; Vt. Laws, 1921, No. 261; N. H. Laws, 1921, ch. 15. Similar legislation is pending in the legislatures of Rhode Island and Kentucky.

[4] See *Commonwealth v. Nolan* (1920) 189 Ky. 34, 224 S. W. 506. To illustrate: